

Attachment D -- Appendix A
(Selective LMDS Rules)

CODE OF FEDERAL REGULATIONS
TITLE 47-TELECOMMUNICATION
CHAPTER I-FEDERAL COMMUNICATIONS COMMISSION
PART 1-PRACTICE AND PROCEDURE
SUBPART Q--COMPETITIVE BIDDING PROCEEDINGS

Sec. 1.2105 Bidding application and certification procedures; prohibition of collusion.

(a) Submission of Short-Form Application (FCC Form 175). In order to be eligible to bid, an applicant must timely submit a short-form application (FCC Form 175), together with any appropriate upfront payment set forth by Public Notice. Beginning January 1, 1999, all short-form applications must be filed electronically.

(1) All short-form applications will be due:

(i) On the date(s) specified by public notice; or

(ii) In the case of application filing dates which occur automatically by operation of law (see, e.g., 47 CFR 22.902), on a date specified by public notice after the Commission has reviewed the applications that have been filed on those dates and determined that mutual exclusivity exists.

(2) The short-form application must contain the following information:

(i) Identification of each license on which the applicant wishes to bid;

(ii)(A) The applicant's name, if the applicant is an individual. If the applicant is a corporation, then the short-form application will require the name and address of the corporate office and the name and title of an officer or director. If the applicant is a partnership, then the application will require the name, citizenship and address of all general partners, and, if a partner is not a natural person, then the name and title of a responsible person should be included as well. If the applicant is a trust, then the name and address of the trustee will be required. If the applicant is none of the above, then it must identify and describe itself and its principals or other responsible persons; and

(B) Applicant ownership information, as set forth in Sec.1.2112.

(iii) The identity of the person(s) authorized to make or withdraw a bid;

(iv) If the applicant applies as a designated entity pursuant to Sec.1.2110, a statement to that effect and a declaration, under penalty of perjury, that the applicant is qualified as a designated entity under Sec. 1.2110.

(v) Certification that the applicant is legally, technically, financially and otherwise qualified pursuant to section 308(b) of the Communications Act of 1934, as amended. The Commission will accept applications certifying that a request for waiver or other relief from the requirements of section 310 is pending;

(vi) Certification that the applicant is in compliance with the foreign ownership provisions of section 310 of the Communications Act of 1934, as amended;

(vii) Certification that the applicant is and will, during the pendency of its application(s), remain in compliance with any service-specific qualifications applicable to the licenses on which the applicant intends to bid including, but not limited to, financial qualifications. The Commission may require certification in certain services that the applicant will, following grant of a license, come into compliance with certain service-specific rules, including, but not limited to, ownership eligibility limitations;

(viii) An exhibit, certified as truthful under penalty of perjury, identifying all parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure.

(ix) Certification under penalty of perjury that it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties other than those identified pursuant to paragraph (a)(2)(viii) regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid.

Note to paragraph (a): The Commission may also request applicants to submit additional information for informational purposes to aid in its preparation of required reports to Congress.

(b) Modification and Dismissal of Short-Form Application (FCC Form 175).

(1) Any short-form application (FCC Form 175) that does not contain all of the certifications required pursuant to this section is unacceptable for filing and cannot be corrected subsequent to the applicable filing deadline. The application will be dismissed with prejudice and the upfront payment, if paid, will be returned.

(2) The Commission will provide bidders a limited opportunity to cure defects specified herein (except for failure to sign the application and to make certifications) and to resubmit a corrected application. During the resubmission period for curing defects, a short-form application may be amended or modified to cure defects identified by the Commission or to make minor amendments or modifications. After the resubmission period has ended, a short-form application may be amended or modified to make minor changes or correct minor errors in the application. Major amendments cannot be made to a short-form application after the initial filing deadline. Major amendments include changes in ownership of the applicant that would constitute an assignment or transfer of control, changes in an applicant's size which would affect eligibility for designated entity provisions, and changes in the license service areas identified on the short-form application on which the applicant intends to bid. Minor amendments include, but are not limited to, the correction of typographical errors and other minor defects not identified as major. An application will be considered to be newly filed if it is amended by a major amendment and may not be resubmitted after applicable filing deadlines.

(3) Applicants who fail to correct defects in their applications in a timely manner as specified by public notice will have their applications dismissed with no opportunity for resubmission.

(c) Prohibition of collusion.

(1) Except as provided in paragraphs (c)(2), (c)(3) and (c)(4) of this section, after the filing of short-form applications, all applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the high bidder makes the required down payment, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application pursuant to Sec. 1.2105(a)(2)(viii).

(2) Applicants may modify their short-form applications to reflect formation of consortia or changes in ownership at any time before or during an auction, provided such changes do not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for licenses in any of the same geographic license areas. Such changes will not be considered major modifications of the application.

(3) After the filing of short-form applications, applicants may make agreements to bid jointly for licenses, provided the parties to the agreement have not applied for licenses in any of the same geographic license areas.

(4) After the filing of short-form applications, a holder of a non-controlling attributable interest in an entity submitting a short-form application may acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with, other applicants for licenses in the same geographic license area, provided that:

(i) The attributable interest holder certifies to the Commission that it has not communicated and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest, or with which it has a consortium or joint bidding arrangement, and which have applied for licenses in the same geographic license area(s); and

(ii) The arrangements do not result in any change in control of an applicant; or

(iii) When an applicant has withdrawn from the auction, is no longer placing bids and has no further eligibility, a holder of a non-controlling, attributable interest in such an applicant may obtain an ownership interest in or enter into a consortium with another applicant for a license in the same geographic service area, provided that the attributable interest holder certifies to the Commission that it did not communicate with the new applicant prior to the date that the original applicant withdrew from the auction.

(5) Applicants must modify their short-form applications to reflect any changes in ownership or in membership of consortia or joint bidding arrangements.

(6) For purposes of this paragraph:

(i) The term applicant shall include all controlling interests in the entity submitting a short-form application to participate in an auction (FCC Form 175), as well as all holders of partnership and other ownership interests and any stock interest amounting to 10 percent or more of the entity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application, and all officers and directors of that entity; and

(ii) The term bids or bidding strategies shall include capital calls or requests for additional funds in support of bids or bidding strategies.

Example: Company A is an applicant in area 1. Company B and Company C each own 10 percent of Company A. Company D is an applicant in area 1, area 2, and area 3. Company C is an applicant in area 3. Without violating the Commission's Rules, Company B can enter into a consortium arrangement with Company D or acquire an

ownership interest in Company D if Company B certifies either (1) that it has communicated with and will communicate neither with Company A or anyone else concerning Company A's bids or bidding strategy, nor with Company C or anyone else concerning Company C's bids or bidding strategy, or (2) that it has not communicated with and will not communicate with Company D or anyone else concerning Company D's bids or bidding strategy.

Sec. 1.2107 Submission of down payment and filing of long-form applications.

(a) After bidding has ended, the Commission will identify and notify the high bidder and declare the bidding closed.

(b) Unless otherwise specified by public notice, within ten (10) business days after being notified that it is a high bidder on a particular license(s), a high bidder must submit to the Commission's lockbox bank such additional funds (the "down payment") as are necessary to bring its total deposits (not including upfront payments applied to satisfy bid withdrawal or default payments) up to twenty (20) percent of its high bid(s). (In single round sealed bid auctions conducted under Sec. 1.2103, however, bidders may be required to submit their down payments with their bids.) Unless otherwise specified by public notice, this down payment must be made by wire transfer in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission. Down payments will be held by the Commission until the high bidder has been awarded the license and has paid the remaining balance due on the license or authorization, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable payments. No interest on any down payment will be paid to the bidders.

(c) A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the "long-form application") pursuant to the rules governing the service in which the applicant is the high bidder. Notwithstanding any other provision in title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application filing fee with their long-form applications. Specific procedures for filing applications will be set out by Public Notice. Ownership disclosure requirements are set forth in Sec. 1.2112. Beginning January 1, 1999, all long-form applications must be filed electronically. An applicant that fails to submit the required long-form application under this paragraph and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and will be subject to the payments set forth in Sec. 1.2104.

(d) As an exhibit to its long-form application, the applicant must provide a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement it had entered into relating to the competitive bidding process prior to the time bidding was completed. Such agreements must have been entered into prior to the filing of short-form applications pursuant to Sec. 1.2105.

Sec. 1.2108 Procedures for filing petitions to deny against long-form applications.

(a) Where petitions to deny are otherwise provided for under the Act or the commission's Rules, and unless other service-specific procedures for the filing of such petitions are provided for elsewhere in the Commission's Rules, the procedures in this section shall apply to the filing of petitions to deny the long-form applications of winning bidders.

(b) Within a period specified by Public Notice, and after the Commission by public notice announces that long-form applications have been accepted for filing, petitions to deny such applications may be filed. In all cases, the period for filing petitions to deny shall be no shorter than five (5) days. Any such petitions must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.

(c) An applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition. Allegations of fact or denials thereof must be supported by affidavit of a person or persons with personal knowledge thereof. The time for filing such oppositions shall be at least five (5) days from the filing date for petitions to deny, and the time for filing replies shall be at least five (5) days from the filing date for oppositions. The Commission may grant a license based on any long-form application that has been accepted for filing. The Commission shall in no case grant licenses earlier than seven (7) days following issuance of a public notice announcing long-form applications have been accepted for filing.

(d) If the Commission determines that:

(1) an applicant is qualified and there is no substantial and material issue of fact concerning that determination, it will grant the application.

(2) an applicant is not qualified and that there is no substantial issue of fact concerning that determination, the Commission need not hold a evidentiary hearing and will deny the application.

(3) substantial and material issues of fact require a hearing, it will conduct a hearing. The Commission may permit all or part of the evidence to be submitted in written form and may permit employees other than administrative law judges to preside at the taking of written evidence. Such hearing will be conducted on an expedited basis.

Sec. 1.2112 Ownership disclosure requirements for short- and long-form applications.

(a) Each application for a license or authorization or for consent to assign or transfer control of a license or authorization shall disclose fully the real party or parties in interest and must include in an exhibit the following information:

(1) A list of any FCC-regulated business 10 percent or more of whose stock, warrants, options or debt securities are owned by the applicant or an officer, director, attributable stockholder or key management personnel of the applicant. This list must include a description of each such business's principal business and a description of each such business's relationship to the applicant;

(2) A list of any party holding a 10 percent or greater interest in the applicant, including the specific amount of the interest;

(3) A list of any party holding a 10 percent or greater interest in any entity holding or applying for any FCC-regulated business in which a 10 percent or more interest is held by another party which holds a 10 percent or more interest in the applicant (e.g., If company A owns 10 percent of Company B (the applicant) and 10 percent of Company C then Companies A and C must be listed on Company B's application;

(4) A list of the names, addresses, and citizenship of any party holding 10 percent or more of each class of stock, warrants, options or debt securities together with the amount and percentage held;

(5) A list of the names, addresses, and citizenship of all controlling interests of the applicants, as set forth in Sec. 1.2110;

(6) In the case of a general partnerships, the name, address and citizenship of each partner, and the share or interest participation in the partnership;

(7) In the case of a limited partnerships, the name, address and citizenship of each limited partner whose interest in the applicant is equal to or greater than 10 percent (as calculated according to the percentage of equity paid in and the percentage of distribution of profits and losses);

(8) In the case of a limited liability corporation, the name, address and citizenship of each of its members; and

(9) A list of all parties holding indirect ownership interests in the applicant, as determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain, that equals 10 percent or more of the applicant, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated and reported as if it were a 100 percent interest.

(b) In addition to the information required under paragraph (a) of this section, each applicant for a license or authorization claiming status as a small business shall, as an exhibit to its long-form application:

(1) Disclose separately and in the aggregate the gross revenues, computed in accordance with Sec. 1.2110, for each of the following: the applicant and its affiliates, the applicant's attributable investors, affiliates of its attributable investors, and, if a consortium of small businesses, the members comprising the consortium;

(2) List and summarize all agreements or instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business under the applicable designated entity provisions, including the establishment of de facto and de jure control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

(3) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

**CODE OF FEDERAL REGULATIONS
TITLE 47-TELECOMMUNICATION
CHAPTER I-FEDERAL COMMUNICATIONS COMMISSION
PART 1-PRACTICE AND PROCEDURE
SUBPART L--LOCAL MULTIPOINT DISTRIBUTION SERVICE**

Sec. 101.1001 Eligibility.

Any entity, other than one precluded by Sec. 101.7 and by Sec. 101.1003, is eligible for authorization to provide Local Multipoint Distribution Service (LMDS) under this subpart. Authorization will be granted upon proper application filed under the rules in this part.

Sec. 101.1003 LMDS eligibility restrictions for incumbent LECs and cable companies.

(a) Eligibility for LMDS license. Except as provided in paragraph (b) of this section, no incumbent LEC or incumbent cable company, as defined in paragraph (c) of this section, nor any entity owning an attributable interest in an incumbent LEC or incumbent cable company, shall have an attributable interest in an LMDS license whose geographic service area significantly overlaps such incumbent's authorized or franchised service area.

(1) Termination of restriction. This restriction shall terminate three years following June 30, 1997 unless the Commission extends its applicability based on a determination that incumbent LECs or incumbent cable companies continue to have substantial market power in the provision of local telephony or cable television services.

(2) Waiver of restriction. Upon completion of the initial award of LMDS licenses, an incumbent LEC or incumbent cable company may petition for a waiver of the restriction on eligibility based upon a showing that the petitioner no longer has market power in its authorized or franchised service area as the result of the entry of new competitors, other than an LMDS licensee, into such service area.

(b) Exception to eligibility restriction. The restriction set forth in paragraph (a) of this section shall not apply to any license for the 31,000-31,075 megahertz and 31,225-31,300 megahertz bands of LMDS spectrum.

(c) Incumbent LECs and cable companies defined. The terms incumbent LEC and incumbent cable company shall be defined as follows:

(1) Incumbent LEC. The term incumbent local exchange carrier or incumbent LEC shall be defined, in accordance with section 251(h) of the Communications Act, to mean, with respect to an area, that:

(i) On February 8, 1996, the LEC provided telephone exchange service in such area and was deemed to be a member of the exchange carrier association pursuant to Sec. 69.601(b) of this chapter; or

(ii) Is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in paragraph (c)(1)(i) of this section; or

(iii) Is an entity, or a member of a class or category of entities, that the Commission has determined under section 251(h)(2) of the Communications Act to treat as a local exchange carrier.

(2) Incumbent cable company. The term incumbent cable company means a company that is franchised to provide cable service and is not subject to effective competition under the following definition of effective competition in section 623(l) of the Communications Act:

(i) Fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system; or

(ii) The franchise area is:

(A) Served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and

(B) The number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area; or

(iii) A multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households of that franchise area; or

(iv) A local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite

services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

(d) Significant overlap with authorized or franchised service area. For purposes of paragraph (a) of this section, a significant overlap of an incumbent LEC's or incumbent cable company's authorized or franchised service area occurs when at least 10 percent of the population of the LMDS licensed service area, as determined by the 1990 census figures for the counties contained in such service area, is within the authorized or franchised service area.

(e) Definition of attributable interest. For purposes of paragraph (a) of this section, an entity shall be considered to have an attributable interest in an incumbent LEC, incumbent cable company, or LMDS licensee pursuant to the following criteria:

(1) A controlling interest shall constitute an attributable interest. Controlling interest means majority voting equity ownership, any general partnership interest, or any means of actual working control (including negative control) over the operation of the entity, in whatever manner exercised.

(2) Partnership and similar ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock or outstanding voting stock of an entity.

(3) Stock interests held in trust that exceed the limit set forth in paragraph (e)(2) of this section shall constitute an attributable interest of any person who holds or shares the power to vote such stock, of any person who has the sole power to sell such stock, and, in the case of stock held in trust, of any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust shall constitute an attributable interest of such grantor or beneficiary, as appropriate.

(4) Non-voting stock shall constitute an attributable interest in the issuing entity if it exceeds the limit set forth in paragraph (e)(2) of this section.

(5) Debt and interests such as warrants and convertible debentures, options, or other interests (except non-voting stock) with rights of conversion to voting interests shall not constitute attributable interests unless and until conversion is effected.

(6) Limited partnership interests amounting to 20 percent or more, calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses, shall constitute an attributable interest of each such limited partner.

(7) Officers and directors of an incumbent LEC or incumbent cable company, an LMDS licensee, or an entity that controls such incumbent LEC, incumbent cable company, or LMDS licensee, shall be considered to have an attributable interest in such incumbent LEC, incumbent cable company, or LMDS licensee.

(8) Ownership interests that are held indirectly by any party through one or more intervening corporations or other entities shall be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that, if the ownership for any interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(9) Any person who manages the operations of an incumbent LEC or incumbent cable company or an LMDS licensee pursuant to a management agreement shall be considered to have an attributable interest in such incumbent LEC, incumbent cable company or LMDS licensee, if such person or its affiliate has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

- (i) The nature or types of services offered by such entity;
- (ii) The terms upon which such services are offered; or
- (iii) The prices charged for such services.

(10) Any person or its affiliate who enters into a joint marketing arrangement with an incumbent LEC, an incumbent cable company, an LMDS licensee, or an affiliate of such entity, shall be considered to have an attributable interest in such incumbent LEC, incumbent cable company, LMDS licensee, or affiliate, if such person or its affiliate has authority to make decisions or otherwise engage in practices or activities that determine:

- (i) The nature or types of services offered by such entity;
- (ii) The terms upon which such services are offered; or
- (iii) The prices charged for such services.

(f) Divestiture. Any incumbent LEC or incumbent cable company, or any entity owning an attributable interest in an incumbent LEC or incumbent cable company, that would otherwise be barred from participating in an LMDS auction by the eligibility restriction in paragraph (a) of this section, may be a party to an LMDS application (i.e., have an attributable interest in the applicant), and such applicant will be eligible for an LMDS license, pursuant to the divestiture procedures set forth in paragraphs (f)(1) through (f)(6) of this section.

(1) Divestiture shall be limited to the following prescribed means:

(i) An LMDS applicant holding an attributable interest in an incumbent LEC or incumbent cable company may divest such interest in the incumbent LEC or cable company.

(ii) Other LMDS applicants disqualified under paragraph (a) of this section, will be permitted to:

(A) Partition and divest that portion of the existing authorized or franchised service area that causes it to exceed the overlap restriction in paragraph (d) of this section, subject to applicable regulations of state and local governments; or

(B) Partition and divest that portion of the LMDS geographic service area that exceeds the overlap restriction in paragraph (d) of this section.

(iii) Divestiture may be to an interim trustee if a buyer has not been secured in the required period of time, as long as the LMDS applicant has no interest in or control of the trustee and the trustee may dispose of the license as it sees fit.

(2) The LMDS applicant shall certify as an exhibit to its short form application that it and all parties to the application will come into compliance with paragraph (a) of this section.

(3) If such LMDS applicant is a successful bidder in an auction, it must submit with its long-form application a signed statement describing its efforts to date and future plans to come into compliance with the eligibility restrictions in paragraph (a) of this section.

(4) If such an LMDS applicant is otherwise qualified, its application will be granted subject to a condition that the applicant shall come into compliance with the eligibility restrictions in paragraph (a) of this section, within ninety (90) days of final grant of such LMDS license.

(5) An LMDS applicant will be considered to have come into compliance with paragraph (a) of this section if:

(i) In the case of the divestiture of a portion of an LMDS license, it has submitted to the Commission an application for license assignment or transfer of control of the requisite portion of the LMDS geographic service area.

(ii) In all other cases, it has submitted to the Commission a signed certification that it has come into compliance with paragraph (a) of this section by the following means, identified in such certification:

(A) By divestiture of a disqualifying interest in an incumbent LEC or incumbent cable company, identified in terms of the interest owned, the owner of such interest (and, if such owner is not the applicant itself, the relationship of the owner to the applicant), the name of the party to whom such interest has been divested, and the date such divestiture was executed; or

(B) By divestiture of the requisite portion of the incumbent LEC's or incumbent cable company's existing authorized or franchised service area, identified in terms of the name of the party to whom such interest has been divested, the date such divestiture was executed, the name of any regulatory agency that must approve such divestiture, and the date on which an application was filed for this purpose with the regulatory agency.

(6) If no such certification or application is tendered to the Commission within ninety (90) days of final grant of the initial license, the Commission may consider the short form certification and the long form divestiture statement to be material, bad faith misrepresentations and shall invoke the condition on the initial license, cancelling or rescinding it automatically, shall retain all monies paid to the Commission, and, based on the facts presented, shall take any other action it may deem appropriate.

Note to Sec. 101.1003: Waivers of Sec. 101.1003(e) may be granted upon an affirmative showing:

1. That the interest holder has less than a 50 percent voting interest in the licensee and there is an unaffiliated single holder of a 50 percent or greater voting interest;
2. That the interest holder is not likely to affect the local market in an anticompetitive manner;
3. That the interest holder is not involved in the operations of the licensee and does not have the ability to influence the licensee on a regular basis; and
4. That grant of a waiver is in the public interest because the benefits to the public of common ownership outweigh any potential anticompetitive harm to the market.

Sec. 101.1005 Frequencies available.

(a) The following frequencies are available for assignment to LMDS in two license blocks:

Block A of 1,150 MHz

27,500-28,350 MHz

29,100-29,250 MHz

31,075-31,225 MHz

Block B of 150 MHz

31,000-31,075 MHz

31,225-31,300 MHz

(b) In Block A licenses, the frequencies are authorized as follows:

(1) 27,500-28,350 MHz is authorized on a primary protected basis and is shared with Fixed Satellite Service (FSS) systems.

(2) 29,100-29,250 MHz is shared on a co-primary basis with feeder links for non-geostationary orbit Mobile Satellite Service (NGSO/MSS) systems in the band and is limited to LMDS hub-to-subscriber transmissions, as provided in Sec. 25.257 and Sec. 101.103(h).

(3) 31,075-31,225 MHz is authorized on a primary protected basis and is shared with private microwave point-to-point systems licensed prior to March 11, 1997, as provided in Sec. 101.103(b).

(c) In Block B licenses, the frequencies are authorized as follows:

(1) On a primary protected basis if LMDS shares the frequencies with systems licensed as Local Television Transmission Service (LTTS) licensed prior to March 11, 1997, as provided in Sec. 101.103(b).

(2) On a co-equal basis with systems not licensed as LTTS prior to March 11, 1997, as provided in Sec. 101.103(g).

Sec. 101.1007 Geographic service areas and number of licenses.

LMDS service areas are Basic Trading Areas (BTAs) as defined in the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38-39, that identifies 487 BTAs based on the 50 States and as defined to include the BTA-like areas of the United States Virgin Islands, American Samoa, Guam, Mayaguez/Aguadilla-Ponce, Puerto Rico, San Juan, Puerto Rico, and the Commonwealth of Northern Marinas, for a total of 493 BTAs.

Sec. 101.1009 System operations.

(a) The licensee may construct and operate any number of fixed stations anywhere within the area authorized by the license without prior authorization, except as follows:

(1) A station would be required to be individually licensed if:

(i) International agreements require coordination;

(ii) Submission of an Environmental Assessment is required under Sec. 1.1307 of this chapter.

(iii) The station would affect the radio quiet zones under Sec. 101.123.

(2) Any antenna structure that requires notification to the Federal Aviation Administration (FAA) must be registered with the Commission prior to construction under Sec. 17.4 of this chapter.

(b) Whenever a licensee constructs or makes system changes as described in paragraph (a) of this section, the licensee is required to notify the Commission within 30 days of the change under Sec. 101.61 and include a statement of the technical parameters of the changed station.

Sec. 101.1011 Construction requirements and criteria for renewal expectancy.

(a) LMDS licensees must make a showing of "substantial service" in their license area within ten years of being licensed. "Substantial" service is defined as service which is sound, favorable, and substantially above a level of mediocre service which might minimally warrant renewal. Failure by any licensee to meet this requirement will result in forfeiture of the license and the licensee will be ineligible to regain it.

(b) A renewal applicant involved in a comparative renewal proceeding shall receive a preference, commonly referred to as a renewal expectancy, that is the most important comparative factor to be considered in the proceeding as long as the applicant's past record for the relevant license period demonstrates that:

(1) The renewal applicant has provided "substantial" service during its past license term; and

(2) The renewal applicant has substantially complied with applicable FCC rules, policies, and the Communications Act of 1934, as amended.

(c) In order to establish its right to a renewal expectancy, an LMDS renewal applicant involved in a comparative renewal proceeding must submit a showing explaining why it should receive a renewal expectancy. At a minimum, this showing must include:

(1) A description of its current service in terms of geographic coverage and population served:

(2) An explanation of its record of expansion, including a timetable of new construction to meet changes in demand for service:

(3) A description of its investments in its LMDS system; and

(4) Copies of all FCC orders finding the licensee to have violated the Communications Act or any FCC rule or policy; and a list of any pending proceedings that relate to any matter described in this paragraph.

(d) In making its showing of entitlement to a renewal expectancy, a renewal applicant may claim credit for any system modification applications that were pending on the date it filed its renewal application. Such credit will not be allowed if the modification application is dismissed or denied.

Sec. 101.1013 Permissible communications services.

(a) Authorizations for stations in the Local Multipoint Distribution Service will be granted to provide services on a common carrier basis or a non-common carrier basis or on both a common carrier and non-common carrier basis in a single authorization.

(b) Stations may render any kind of communications service consistent with the Commission's rules and the regulatory status of the station to provide services on a common carrier or non-common carrier basis.

(c) An applicant or licensee may submit a petition at any time requesting clarification of the regulatory status required to provide a specific communications service.

Sec. 101.1015 Application form and contents.

(a) Applications for initial authorization are filed on FCC Form 175 in accordance with Subpart M of this part, and part 1 of this chapter, subpart Q. FCC Form 600 is submitted subsequently either by the winning bidder, if an auction is held to decide among two or more mutually exclusive applications, or, in cases of no mutual exclusivity, by the sole applicant. Applications to amend pending applications and to modify licenses are filed on FCC Form 600.

(b) Foreign ownership information. All LMDS applicants will provide the information requested on FCC Form 600 to address all of the eligibility requirements in Sec. 101.7. All licensees will keep the information updated.

Sec. 101.1017 Requesting regulatory status.

(a) Initial applications. An applicant will specify on FCC Form 600 if it is requesting authorization to provide services on a common carrier basis, a non-common carrier basis, or on both a common carrier and non-common carrier basis.

(b) Amendment of pending applications.

(1) Any pending application may be amended to:

(i) Change the carrier status requested, or

(ii) Add to the pending request in order to obtain both common carrier and non-common carrier status in a single license.

(2) Amendments to change, or add to, the carrier status in a pending application are minor amendments filed under Sec. 101.29.

(c) Modification of license.

(1) A licensee may modify a license to:

(i) Change the carrier status authorized, or

(ii) Add to the status authorized in order to obtain both common carrier and non-common carrier status in a single license.

(2) Applications to change, or add to, the carrier status in a license are modifications not requiring prior Commission authorization filed under Sec. 101.61. If the change results in the discontinuance, reduction, or impairment of an existing service, the licensee is also governed by Sec. 101.305(b) or (c) and submits the application under Sec. 101.61 in conformance with the time frames and requirements of Sec. 101.305(b) or (c).

SUBPART M--COMPETITIVE BIDDING PROCEDURES FOR LMDS

Sec. 101.1101 LMDS service subject to competitive bidding.

Mutually exclusive initial applications for LMDS licenses are subject to competitive bidding procedures. The procedures set forth in part 1, subpart Q, of this chapter will apply unless otherwise provided in this part.

Sec. 101.1102 Competitive bidding design for LMDS.

The Commission will employ a simultaneous multiple round auction design when choosing from among mutually exclusive initial applications to provide LMDS, unless otherwise specified by the Wireless Telecommunications Bureau before the auction.

Sec. 101.1103 Competitive bidding mechanisms.

(a) Sequencing. The Commission will establish and may vary the sequence in which LMDS licenses are auctioned.

(b) Grouping. The Commission will determine which licenses will be auctioned simultaneously or in combination based on interdependency and administrative circumstances.

(c) Minimum bid increments. The Commission may, by public announcement before or during an auction, require minimum bid increments in dollar or percentage terms.

(d) Stopping rules. The Commission may establish stopping rules before or during an auction in order to terminate the auction within a reasonable time.

(e) Activity rules. The Commission may establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in connection with a simultaneous multiple round auction, each bidder may request waivers of such rule during the auction. The Commission may, by public announcement either before or during the auction, specify or vary the number of waivers available to each bidder.

(f) Bid withdrawal, default and disqualification payments. The Commission will impose payments on bidders who withdraw high bids during the course of an auction, who default on payments due

after an auction terminates, or who are disqualified. Payments will be calculated as set forth in Secs. 1.2104(g) and 1.2109 of this chapter. When the amount of such a payment cannot be determined, a deposit of up to 20 percent of the amount bid on the license will be required.

(g) Tie bids. Where a tie bid occurs, the high bidder will be determined by the order in which the bids were received by the Commission.

Sec. 101.1104 Bidding application (FCC Forms 175 and 175-S).

Each applicant to participate in competitive bidding for LMDS licenses must submit an application (FCC Forms 175 and 175-S) pursuant to the provisions of Sec. 1.2105 of this chapter.

Sec. 101.1105 Submission of payments.

(a) Each applicant to participate in an LMDS auction will be required to submit an upfront payment in accordance with Sec. 1.2106 of this chapter as announced by the Wireless Telecommunications Bureau by Public Notice.

(b) Winning bidders in LMDS auctions must submit a down payment to the Commission in an amount sufficient to bring their total deposits up to 20 percent of their winning bids within ten business days following the release of a Public Notice announcing the close of the auction. Winning bidders must pay the full balance of their winning bids within ten business days following the release of a Public Notice that the Commission is prepared to award the licenses.

Sec. 101.1106 Long-form application (FCC Form 600).

Each successful bidder for an LMDS license must submit a long-form application (FCC Form 600) within ten business days after being notified by Public Notice that it is the winning bidder. Applications for LMDS on FCC Form 600 must be submitted in accordance with Sec. 1.2107 of this chapter, all applicable procedures set forth in the rules in this part, and any applicable Public Notices that the Commission may issue in connection with an auction. After an auction, the Commission will not accept long-form applications for LMDS licenses from anyone other than the auction winners and parties seeking partitioned licenses pursuant to agreements with auction winners under Sec. 101.1111 of this chapter.

Sec. 101.1107 Bidding credits for very small businesses, small businesses and entrepreneurs; unjust enrichment.

(a) A winning bidder that qualifies as a very small business or a consortium of very small businesses pursuant to Sec. 101.1112 may use a bidding credit of 45 percent to lower the cost of its winning bid.

(b) A winning bidder that qualifies as a small business or a consortium of small businesses pursuant to Sec. 101.1112 may use a bidding credit of 35 percent to lower the cost of its winning bid.

(c) A winning bidder that qualifies as an entrepreneur or a consortium of entrepreneurs pursuant to Sec. 101.1112 may use a bidding credit of 25 percent to lower the cost of its winning bid.

(d) The bidding credits referenced in paragraphs (a), (b) and (c) of this section are not cumulative.

(e) Unjust enrichment.

(1) A licensee that utilizes a bidding credit, and that during the initial license term seeks to assign or transfer control of a license to an entity that does not meet the eligibility criteria for a bidding credit, will be required to reimburse the U.S. Government for the amount of the bidding credit, plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license is granted, as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer. If, within the initial license term, a licensee that utilizes a bidding credit seeks to make any ownership change that would result in the licensee losing eligibility for a bidding credit (or qualifying for a lower bidding credit), the amount of the bidding credit (or the difference between the bidding credit originally obtained and the bidding credit for which the restructured licensee would qualify), plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the ownership change.

(2) The amount of payments made pursuant to paragraph (e)(1) of this section will be reduced over time as follows:

(i) A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or the difference between the bidding credit obtained by the original licensee and the bidding credit for which the post-transfer licensee is eligible);

(ii) In year three of the license term the payment will be 75 percent;

(iii) In year four of the license term the payment will be 50 percent; and

(iv) In year five of the license term the payment will be 25 percent, after which there will be no required payment.

Sec. 101.1109 Certifications, disclosures, records maintenance and audits.

(a) Short-form applications: certifications and disclosure. In addition to certifications and disclosures required in part 1, subpart Q, of this chapter, each applicant for an LMDS license which qualifies as a very small business, small business or entrepreneurs pursuant to Sec. 101.1112 shall append the following information as an exhibit to its short-form applications (FCC Form 175):

- (1) The identities of the applicant's affiliates and controlling principals; and
- (2) The applicant's gross revenues, computed in accordance with Sec. 101.1112.

(b) Long-form applications: certifications and disclosure. In addition to the requirements in Sec. 1.2107 of this chapter, each applicant submitting a long-form application for an LMDS license and qualifying as a very small business, small business or entrepreneur pursuant to Sec. 101.1112 shall, in an exhibit to its long-form application:

- (1) Disclose separately and in the aggregate the gross revenues, computed in accordance with Sec. 101.1112, for each of the following: the applicant, the applicant's affiliates, the applicant's controlling principals, and, if a consortium of very small businesses, small businesses or entrepreneurs, the members of the consortium;
- (2) List and summarize all agreements or other instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a very small business, small business or entrepreneur, including the establishment of de facto and de jure control; such agreements and instruments include, but are not limited to, articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements including letters of intent, oral or written; and
- (3) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

(c) Records maintenance. All winning bidders qualifying as very small businesses, small businesses or entrepreneurs shall maintain at their principal place of business an updated file of ownership, revenue, and asset information, including any document necessary to establish eligibility as a very small business, small business or entrepreneur. Licensees (and their successors-in-interest) shall maintain such files for the term of the license. Applicants that do not obtain the license(s) for which they applied shall maintain such files until the grant of such license(s) is final, or one year from the date of the filing of their short-form application (FCC Form 175), whichever is earlier.

(d) Audits.

(1) Applicants and licensees claiming eligibility as a very small business, small business or entrepreneur pursuant to Sec. 101.1112 shall be subject to audits by the Commission. Selection for audit may be random, on information, or on the basis of other factors.

(2) Consent to such audits is part of the certification included in the short-form application (FCC Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents and other material (including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding licensed LMDS service, and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

Sec. 101.1110 Petitions to deny.

Procedures regarding petitions to deny long-form applications in the LMDS service will be governed by Sec. 1.2108 (b) through (d) of this chapter.

Sec. 101.1111 Procedures for partitioned licenses.

(a) LMDS licensees may apply to partition their licensed geographic service area or disaggregate their licensed spectrum.

(b) If partitioned licenses or disaggregated licenses are being applied for in conjunction with a license(s) to be awarded through competitive bidding procedures--

(1) The applicable procedures for filing short-form applications and for submitting upfront payments and down payments contained in this chapter shall be followed by the applicant, which must disclose as part of its short-form application all parties to agreement(s) with or among entities to partition or disaggregate the license pursuant to this section, if won at auction. See Sec. 1.2105(a)(2)(viii).

(2) Each entity that is a party to an agreement to partition the license shall file a long-form application for its respective, mutually agreed-upon geographic area or spectrum together with the application for the remainder of the BTA or spectrum filed by the auction winner.

(c) If the partitioned or disaggregated license is being applied for as a partial assignment of the license following grant of the initial license, request for authorization for partial assignment of a license shall be made pursuant to Sec. 101.115(f).

Sec. 101.1112 Definitions.

(a) Scope. The definitions in this section apply to Secs. 101.1101 through 101.1112, unless otherwise specified in those sections.

(b) Very small business. A very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$15 million.

(c) Small business. A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of more than \$15 million but not more than \$40 million.

(d) Entrepreneur. An entrepreneur is an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of more than \$40 million but not more than \$75 million.

(e) For purposes of determining whether an entity meets the definition of very small business, small business or entrepreneur, the gross revenues of the applicant, its affiliates and controlling principals shall be considered on a cumulative basis and aggregated.

(f) Consortium. A consortium of very small businesses, small businesses or entrepreneurs is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition of a very small business, small business or entrepreneur. Each individual member must establish its eligibility as a very small business, small business or entrepreneur. Where an applicant (or licensee) is a consortium of very small businesses, small businesses or entrepreneurs, the gross revenues of each business shall not be aggregated.

(g) Gross revenues. Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited financial statements for the relevant number of most recently completed calendar years, or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form application (FCC Form 175). If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not otherwise use audited financial statements, its gross revenues may be certified by its chief financial officer or its equivalent.

(h) Affiliate.

(1) Basis for affiliation. An individual or entity is an affiliate of an applicant if such individual or entity:

- (i) Directly or indirectly controls or has the power to control the applicant;
- (ii) Is directly or indirectly controlled by the applicant;
- (iii) Is directly or indirectly controlled by a third party or parties who also control or have the power to control the applicant; or
- (iv) Has an "identity of interest" with the applicant.

(2) Nature of control in determining affiliation.

(i) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example for paragraph (h)(2)(i). An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power of control.

(ii) Control can arise through stock ownership; occupancy of director, officer, or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(iii) Control can arise through management positions if the voting stock is so widely distributed that no effective control can be established.

Example for paragraph (h)(2)(iii). In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are

controlling principals of the applicant, the other entity will be deemed an affiliate of the applicant.

(3) Identity of interest between and among persons. Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or is controlled by a concern, persons with an identity of interest will be treated as though they were one person.

(i) Spousal affiliation. Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States.

(ii) Kinship affiliation. Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father-or mother-in-law, son-or daughter-in-law, brother-or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, and half-brother or -sister. This presumption may be rebutted by showing that:

(A) The family members are estranged;

(B) The family ties are remote; or

(C) The family members are not closely involved with each other in business matters.

Example for paragraph (h)(3)(ii). A owns a controlling interest in Corporation X. A's sister-in-law, B, has a controlling interest in an LMDS license application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation X is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(4) Affiliation through stock ownership.

(i) An applicant is presumed to control or have the power to control a concern if she owns or controls or has the power to control 50 percent or more of its voting stock.

(ii) An applicant is presumed to control or have the power to control a concern even though he owns, controls, or has the power to control less than 50 percent of the concern's voting stock, if the block of stock she owns, controls, or has the power to control is large as compared with any other outstanding block of stock.

(iii) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(5) Affiliation arising under stock options, convertible debentures, and agreements to merge. Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements will generally be treated as though the rights held thereunder had been exercised. However, neither an affiliate nor an applicant can use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1 for paragraph (h)(5). If company B holds an option to purchase a controlling interest in company A, which holds a controlling interest in an LMDS applicant, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2 for paragraph (h)(5). If a large company, BigCo, holds 70 percent (70 of 100 outstanding shares) of the voting stock of company A, who holds a controlling interest in an LMDS license applicant, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its options to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule, which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3 for paragraph (h)(5). If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(6) Affiliation under voting trusts.

(i) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(ii) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(iii) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(7) Affiliation through common management. Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors or the management (or both) of another entity.

(8) Affiliation through common facilities. Affiliation generally arises where one concern shares office space, employees, or other facilities (or any combination of the foregoing) with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(9) Affiliation through contractual relationships. Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control.

(10) Affiliation under joint venture arrangements. A joint venture for size determination purposes is an association of concerns or individuals (or both), with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(11) Exclusion from affiliation coverage. For purposes of this section, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of this section, except that gross revenues derived from gaming activities conducted by affiliated entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) will be

counted in determining such applicant's (or licensee's) compliance with the financial requirements of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such gross revenues.